ROSLI KAMARUDDIN v. HOW HOCK SING & ANOR

COURT OF APPEAL, PUTRAJAYA
HAMID SULTAN ABU BACKER JCA
BADARIAH SAHAMID JCA
MARY LIM JCA
[CIVIL APPEAL NO: J-02(A)-2177-10-2017]
12 OCTOBER 2018

LEGAL PROFESSION: *Misconduct – Disregarding client's interests – Allegation of – Failure to carry out client's instructions – Complaints lodged to Disciplinary Board ('DB') – Disciplinary Committee ('DC') found solicitor liable – Whether erroneous for DC and DB to take into consideration complaint that has been withdrawn – Whether DB must disband all inquiry relating to withdrawn complaint – Whether DC no longer has jurisdiction – Legal Profession Act 1976, ss. 94(3)(n), 103D*

LEGAL PROFESSION: *Misconduct – Disregarding client's interests – Allegation of – Failure to carry out client's instructions – Solicitor's failure to file for injunctive relief – Whether solicitor ought to ensure client's complaints met applicable and relevant legal threshold before filing application for injunction – Whether there was merit for injunction – Client's refusal to provide undertaking which was paramount to application for interim injunctive relief – Whether solicitor in position to file injunctive relief – Legal Profession Act 1976, ss. 94(3)(n), 103D*

LEGAL PROFESSION: *Disciplinary proceedings – Misconduct – Disregarding client's interests – Allegation of – Failure to carry out client's instructions – Complaints lodged to Disciplinary Board ('DB') – Disciplinary Committee ('DC') found solicitor liable – Burden of proof – Whether misconduct proved beyond reasonable doubt – Whether due and proper weightage given to solicitor's case – Whether evidence led to prove misconduct met established standard of proof – Whether Disciplinary Board ('DB') and Disciplinary Committee ('DC') erred when taking into consideration complaint that has been withdrawn – Whether DB and DC ought to have dismissed complaints – Legal Profession Act 1976, ss. 94(3)(n), 103D*

The first respondent was a director of a company, Reliable Memorial Services Berhad ('RMSB'). A dispute arose between the first respondent and Lee Say Peng ('LSP'), the majority shareholder and director of RMSB. The first respondent appointed the appellant to represent him in relation to that dispute. The first respondent instructed the appellant to file an application for an injunction, restraining LSP from abusing company funds and mismanagement of RMSB. The first respondent paid the appellant RM30,000 for such services. Subsequently, the first respondent paid a

A further sum of RM10,000 instructing the appellant to file an injunction to restrain the convening of an extraordinary general meeting ('EGM') to remove the first respondent and his daughter as directors in RMSB. The first respondent paid a further sum of RM20,000 for work in relation to the injunction. However, by a letter dated 27 August 2015, the first respondent B lodged a complaint with the Disciplinary Board ('DB') pursuant to s. 103D of the Legal Profession Act 1976 ('LPA') against the appellant. The first respondent detailed two complaints of misconduct (i) the appellant's failure to carry out the first respondent's instructions to file for certain injunctive relief; and (ii) the appellant's failure to comply with an 'unless order' given C by the court resulting in the striking out of the first respondent's civil action. The Disciplinary Committee ('DC') held an inquiry and recommended that the appellant be fined RM5,000. The DB affirmed the findings and accepted the recommendations of the DC, and proceeded to fine the appellant the sum proposed by the DC. Dissatisfied, the appellant appealed. The High Court was not able to fault the decision arrived at by the DB and dismissed the D appeal. Hence, the appellant appealed to this court.

Held (allowing appeal)
Per Mary Lim JCA delivering the judgment of the court:

(1) The complaint pertaining to the appellant's failure to comply with the E 'unless order' and the subsequent striking out of the first respondent's civil action was withdrawn by the first respondent during the inquiry. However, it was taken into account as one of the reasons for the DC's ultimate finding of liability against the appellant. It was erroneous of the DC and for the same reason, the DB, to have taken the event relating F to the 'unless order' and its outcome into consideration when the complaint on the event had already been withdrawn. Once withdrawn, the DC no longer had any jurisdiction to deal with the matter. (paras 15-19)

(2) The moment a complaint is withdrawn, unless there are cogent and real G reasons for the DB to suspect otherwise the reasons for the withdrawal, the DB must disband all inquiry relating to the withdrawn complaint. There is no residual power or anything akin to inherent power or retained jurisdiction on the part of the DB and certainly even less, in respect of the DC, to investigate unless the DB itself lodges a fresh H complaint on the same. The first respondent had withdrawn the complaint on the 'unless order' because he now understood that the appellant was not at fault or was not to be blamed for the striking out of his civil action. It was wrong for the DC to have relied on this event to make its findings and recommendations to the DB. (paras 19-20)

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(3) The approach adopted by the DC reflected the failure of the DC and by reason of its adoption without more, the DB, to properly evaluate the complaint and appreciate it in the full context of the first respondent's instructions to the appellant. The evaluation by the DC did not reflect any appreciation of the legal principles and considerations at play. While the first respondent may have wanted and had instructed injunctive reliefs, it was always incumbent on the appellant, befitting his professional role and duties as advocate and solicitor, to ensure that the first respondent's complaints met the applicable and relevant legal threshold before filing any such application. The appellant had given his reasons as to why he did not file any application for an injunction, and there were plenty. None of the reasons seemed to have been considered by the DC. (paras 40-42)

(4) The appellant could not find any merit for an injunction. The first respondent was aware of the principles of injunctive relief involved, that the remedy was not available as of right but as a matter of discretion. There was lack of proof and documentation on any misappropriation by LSP. The first respondent was fully aware of the shortcomings of the documentary proof. Due to the lack of documents and the first respondent's own refusal to provide an undertaking as to damages, an undertaking which was absolutely paramount in any application for interim injunctive relief and which was required by law, the failure to file injunctive relief was fully and adequately accounted for by the appellant. The appellant was in no position at all to file, and it would have been wrong for him to do so under such circumstances. (paras 43-51)

(5) The DC and DB did not satisfy itself that the complaint was proved against the appellant on the requisite burden of proof. Disciplinary proceedings are *quasi*-criminal in nature and the standard of proving misconduct must be on a standard of beyond reasonable doubt. The appellant was being disciplined for misconduct by reason of him having grossly disregarded his client's interests. It is only misconduct when it is proved beyond reasonable doubt that the appellant had grossly, and not merely disregarded the first respondent's interests. The use of the term 'gross' denotes a level of extreme conduct where such conduct is not acceptable, is clearly wrong or is abjectly offensive or unreasonable by the standards maintained at the Bar or the legal profession of which the appellant was a member. (paras 21 & 53)

(6) The LPA provides for an avenue of appeal to the court and in that capacity, the court must scrutinise the records and reports and satisfy itself that all requirements and tests have been met. This was not conducted by the judge. In fact, there was a failure to give due and proper weightage to the appellant's case. The evidence led to prove misconduct under s. 94(3)(n) of the LPA did not meet the established standard of proof in which case, the DC and thereby the DB, ought to have dismissed the complaint of the first respondent. There were serious breaches which were not addressed and put right by the High Court which now warranted intervention (paras 22 & 54)

Bahasa Malaysia *Headnotes*

Responden pertama adalah pengarah sebuah syarikat, Reliable Memorial Services Berhad ('RMSB'). Satu pertikaian timbul antara responden pertama dan Lee Say Peng ('LSP'), pemegang saham majoriti dan pengarah RMSB. Responden pertama melantik perayu untuk mewakilinya berhubung pertikaian itu. Responden pertama mengarahkan perayu memfailkan permohonan injunksi, menghalang LSP menyalahgunakan dana syarikat dan salah urus RMSB. Responden pertama membayar perayu RM30,000 untuk perkhidmatan tersebut. Seterusnya, responden pertama membayar jumlah RM10,000 dengan mengarahkan perayu memfailkan injunksi menghalang persidangan Mesyuarat Agung Luar Biasa ('EGM') untuk menyingkirkan responden pertama dan anak perempuannya sebagai pengarah-pengarah RMSB. Responden pertama membayar jumlah RM20,000 lagi untuk kerja berhubungan injunksi itu. Walau bagaimanapun, melalui surat bertarikh 27 Ogos 2015, responden pertama memfailkan aduan pada Lembaga Disiplin ('LD'), menurut s. 103D Akta Profesion Undang-Undang 1976 ('APU'), terhadap perayu. Responden pertama memberi butiran dua aduan salah laku iaitu (i) kegagalan perayu melaksanakan arahan responden pertama untuk memfailkan relief-relief injunksi; dan (ii) kegagalan perayu mematuhi 'perintah melainkan' yang diberikan mahkamah mengakibatkan tindakan sivil responden pertama dibatalkan. Jawatankuasa Disiplin ('JD') menjalankan satu inkuiri dan mencadangkan perayu didenda RM5,000. Dapatan-dapatan itu disahkan dan cadangan-cadangan yang diberikan oleh JD diterima oleh LD, dan perayu seterusnya didenda jumlah yang dicadangkan oleh JD. Tidak berpuas hati, perayu merayu. Mahkamah Tinggi tidak menjumpai apa-apa kesalahan dalam keputusan yang dicapai oleh LD dan menolak rayuan. Oleh itu, perayu merayu ke mahkamah ini.

Diputuskan (membenarkan rayuan)
Oleh Mary Lim HMR menyampaikan penghakiman mahkamah:

(1) Aduan berkaitan kegagalan perayu mematuhi 'perintah melainkan' dan pembatalan tindakan sivil responden pertama telah ditarik balik oleh responden pertama semasa inkuiri. Walau bagaimanapun, aduan itu

telah diambil kira sebagai salah satu alasan yang membawa kepada dapatan LD bahawa perayu menanggung liabiliti. Jawatankuasa Disiplin dan LD terkhilaf kerana mempertimbangkan kejadian berhubung 'perintah melainkan' dan hasilnya apabila aduan berkenaan kejadian itu telah ditarik balik. Sebaik sahaja ditarik balik, JD tiada lagi bidang kuasa menangani perkara itu.

(2) Apabila aduan ditarik balik, selain wujudnya alasan-alasan wajar dan benar untuk LD mengesyaki sebaliknya alasan-alasan untuk penarikan balik, LD harus membubarkan semua siasatan berhubungan aduan yang ditarik balik itu. Tiada kuasa baki atau apa-apa yang serupa dengan kuasa sedia ada atau injunksi yang ditahan oleh LD dan JD juga tidak mempunyai kuasa menyiasat selain LD memfailkan aduan baharu berkenaan perkara yang sama. Responden pertama telah menarik balik aduan atas 'perintah melainkan' kerana responden pertama sekarang memahami bahawa perayu tidak bersalah dan tidak patut disalahkan untuk pembatalan tindakan sivilnya. Satu kekhilafan untuk JD bergantung pada kejadian ini untuk membuat dapatan-dapatan dan cadangan-cadangannya kepada LD.

(3) Pendekatan yang diambil JD mencerminkan kegagalan JD dan juga LD untuk menilai aduan-aduan dengan betul dan mempertimbangkannya dalam konteks penuh arahan-arahan responden pertama kepada perayu. Penilaian yang dibuat JD tidak mencerminkan apa-apa pertimbangan prinsip-prinsip undang-undang. Walaupun responden pertama ingin dan telah mengarahkan relief-relief injunksi, kewajipan adalah pada perayu, selaras dengan peranan dan tugas profesionalnya sebagai seorang peguam bela dan peguam cara, untuk memastikan aduan-aduan responden pertama mematuhi ambang undang-undang yang sah dan relevan sebelum memfailkan permohonan itu. Perayu telah memberikan alasan-alasannya berkenaan mengapa perayu tidak dapat memfailkan apa-apa permohonan untuk injunksi. Tetapi alasan-alasan tersebut tidak dipertimbangkan oleh JD.

(4) Perayu tidak dapat menemui apa-apa merit untuk injunksi. Responden pertama sedar akan prinsip-prinsip relief-relief injunksi yang terlibat, dan remedi itu tidak sedia ada sebagai satu hak tetapi sebagai hal budi bicara. Terdapat kekurangan bukti dan dokumentasi berkenaan penyalahgunaan LSP. Responden pertama sedar bahawa terdapat kelemahan-kelemahan keterangan dokumentar. Oleh kerana terdapat kekurangan dokumen-dokumen dan responden pertama juga enggan menyediakan aku janji ganti rugi, satu aku janji yang benar-benar penting dalam apa-apa permohonan relief injunksi interim dan adalah satu keperluan undang-undang, kegagalan memfailkan relief injunksi telah

dijelaskan sepenuhnya dan secukupnya oleh perayu. Perayu tidak mempunyai kedudukan untuk memfailkan permohonan, dan adalah salah untuk perayu berbuat sedemikian dalam keadaan seperti ini.

(5) Jawatankuasa Disiplin dan LD tidak memuaskan diri bahawa aduan dibuktikan terhadap perayu atas beban pembuktian bersyarat yang diperlukan. Tindakan disiplin adalah separa jenayah dan standard membuktikan salah laku haruslah standard melampaui keraguan munasabah. Perayu dikenakan tindakan disiplin atas salah laku kerana, secara melampau, mengetepikan kepentingan anak guamnya. Salah laku hanya terbukti apabila dibuktikan melampaui keraguan munasabah bahawa perayu secara terlampau, dan bukan semata-mata mengetepikan kepentingan-kepentingan responden pertama. Penggunaan terma 'melampau' menandakan satu tahap kelakuan ekstrem dan tindakan sebegitu tidak boleh diterima, adalah jelas salah, melampau atau tidak munasabah oleh standard-standard yang dikekalkan Majlis Peguam atau profesion undang-undang di mana perayu merupakan seorang ahli.

(6) Jalan membuat rayuan disediakan oleh APU dan dalam kapasiti itu, mahkamah harus meneliti rekod-rekod serta laporan-laporan dan memuaskan diri bahawa semua keperluan-keperluan dan ujian-ujian dipenuhi. Ini gagal dilakukan oleh hakim. Terdapat juga kegagalan memberikan pemberatan yang dijangka dan sesuai kepada kes perayu. Keterangan yang diberikan untuk membuktikan salah laku bawah s. 94(3) APU tidak memenuhi standard pembuktikan dan dengan itu, JD dan LD harus menolak aduan responden pertama. Terdapat pelanggaran-pelanggaran serius yang tidak ditangani dan dibetulkan oleh Mahkamah Tinggi yang mewajarkan campur tangan.

Case(s) referred to:

Batu Malay Thandy v. Sures Subramaniam & Ors [2015] 1 LNS 343 CA ***(refd)***
Campbell v. Hamlet [2005] 3 All ER 1116 ***(refd)***
Dinesh Kanavaji Kanawagi & Anor v. Ragumaren N Gopal; Majlis Peguam (Intervener) [2018] 2 CLJ 1 FC ***(refd)***
Gana Muthusamy v. Tetuan LM Ong & Co [1998] 4 CLJ 878 CA ***(refd)***
Keith Stellar v. Lee Kwang [1980] 1 LNS 36 FC ***(refd)***
Lembaga Tatatertib Peguam-Peguam v. Hoo Lin Coln & Anor [2008] 4 CLJ 317 FC ***(refd)***
Majlis Peguam v. Cecil Wilbert Mohanaraj Abraham [2018] 9 CLJ 622 CA ***(refd)***
Majlis Peguam v. Dato' Seri Dr Muhammad Shafee Abdullah [2016] 8 CLJ 749 FC ***(refd)***
Re A Solicitor (No 2) [1923] 93 LJ KB 761 ***(refd)***

Legislation referred to:

Legal Profession Act 1976, ss. 94(3)(n), 99, 100(1)(b), 103D

For the appellant - Azmi Ahmad Bakri, Khairulazwad Sariman, Muhammad Fahmi A Jamil; M/s Rosli Kamaruddin & Co
For the 1st respondent - S Jeyakumar
For the 2nd respondent - S Jeyakumar; M/s Tea, Kelvin, Kang & Co

[Editor's note: For the Court of Appeal judgment, please see Rosli Kamaruddin v. How Hock Sing @ Lw Kim Chwee & Anor [2018] 1 LNS 15 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Mary Lim JCA:

[1] Pursuant to s. 103D of the Legal Profession Act 1976, the disciplinary board imposed a fine of RM5,000 on the appellant after it agreed with the findings and recommendations of the disciplinary committee that the appellant was "liable" as per the complaints brought by the first respondent. The appellant's appeal to the High Court was dismissed. After careful consideration of the written and oral submissions and the records of appeal, we unanimously allowed the appeal and set aside the respective decisions of the High Court and the disciplinary board.

The Complaint

[2] By letter dated 27 August 2015, the first respondent lodged a complaint with the disciplinary board against the appellant. In Appendix A attached to his letter, the first respondent detailed two complaints of misconduct. The first respondent also attached relevant supporting documents. The first complaint pertained to the appellant's failure to carry out the first respondent's instructions to file for certain injunctive relief; while the second was the appellant's failure to comply with an 'unless order' given by the court resulting in the striking out of the first respondent's civil action. This is how the appellant came to be instructed by the first respondent.

[3] The first respondent was a director in a company known as Reliable Memorial Services Berhad (RMSB). A dispute arose between the first respondent and Lee Say Peng (Lee), the majority shareholder and director of RMSB. On 13 December 2013, the first respondent appointed the appellant to represent him in relation to that dispute. The first respondent instructed the appellant to file an application for an injunction restraining Lee from abusing company funds and mismanagement of RMSB. The first respondent paid the appellant RM30,000 for such services.

[4] On 19 January 2014, the first respondent paid a further sum of RM10,000 instructing the appellant to file an injunction to restrain the convening of an EGM on 20 February 2014, to remove the first respondent and his daughter as directors in RMSB. On 28 January 2014, the first respondent paid a further sum of RM20,000 for work in relation to the injunction.

[5] By letter dated 27 August 2015, the first respondent lodged a complaint against the appellant. The details of his complaints are as follows. According to the first respondent, despite receiving this RM20,000, no injunction was filed and the first respondent and his daughter were removed as directors. The first respondent further complained that the appellant failed to comply with an unless order which led to his civil suit being struck out. Another legal firm then took over and the civil suit was reinstated.

[6] By letter dated 15 October 2015, the advocates & solicitors disciplinary board (DB) sought a written explanation from the appellant. The appellant provided a written explanation. He also attached a list of 48 documents in support.

[7] The disciplinary committee (DC) held an inquiry at which the first respondent gave evidence through his son-in-law claiming that "saya tak fasih Bahasa Malaysia". The appellant did not object; he, too, gave evidence in addition to his written explanation on the two complaints.

[8] The DC then reported its findings to the disciplinary board, stating as follows:

> [14] The Complainant's instructions to the respondent from the beginning was to file an injunction against the other director at Reliable Memorial Services Berhad, Lee Say Peng. The respondent had been writing to several parties seeking for documents and clarifications but had not received any positive replies. We also found in the ROC at pages …, a set of signed jurats by the Complainant for the purpose of any interim reliefs to be filed by the respondent.
>
> [15] Despite the 19 meetings as stated in evidence by the respondent, we find nowhere in the Bundles before us any documents from the respondent that he could not file the application for the injunction as to the unavailability of the documents from the Complainant.
>
> [16] The SMSs sent by the respondent to the Complainant also portrayed a promise by the respondent to file the injunction at any time but the respondent had failed to do so. The unavailability of the documents needed to file an injunction has never been explained in writing to the Complainant or to any other parties such as the auditor or accountant appointed by the Complainant

[17] We could also not find any evidence that there was at least a draft Notice of Application for the injunction or a draft supporting affidavit. As a matter of fact, we did not find any prayer for an injunction in the Statement of Claim as at pages …

[18] We don't find any reason why the respondent had been promising the Complainant that he would be filing the cause papers for an injunction whereby he did not do so at all.

[19] However, we also find that the Complainant had not suffered any prejudice due to the following reasons:

(i) the criminal case against Lee Say Peng is still ongoing;

(ii) the Court of Appeal has reinstated the struck out case to the High Court and the Complainant could pursue his application for the said injunction if he wishes to

(iii) any damage alleged to have incurred to the Complainant could still be very well pursued by the Complainant against the defendants;

(iv) the Complainant on his own volition has appointed his new solicitors and the respondent had given all the necessary documents to the Complainant's new solicitors.

[D] The Committee's findings on liability

There are merits in the complaint. We find the respondent liable for misconduct under section 94(3)(n) of the Legal Profession Act 1976 in that he had gross disregard for the Complainant's interests.

[9] The DC recommended that the appellant be fined RM5,000. The disciplinary board affirmed the findings and accepted the recommendations of the DC, and proceeded to fine the appellant the sum as proposed by the DC.

[10] Being dissatisfied, the appellant appealed.

Decision Of The High Court

[11] The learned JC found:

(i) that the DC had conducted "quite a comprehensive hearing, where evidence on oath had been taken";

(ii) that the contents of and meaning conveyed in the SMSes exchanged between the appellant and the first respondent "were quite clear";

(iii) "whatever reasons that the appellant may have advanced to explain why he did not file for injunction were simply not consistent with what the first respondent would have understood from the SMSes";

A (iv) "at the end of the day, what would be more important and relevant would be the understanding by the first respondent as to what the appellant was doing for the case that the first respondent had engaged the appellant to handle for him";

B (v) "if it was the case that the appellant was not able to file the application for injunction for whatever reason, this should have been made known to the first respondent and should leave very little doubt from the SMSes sent, which was not seen to be the case here, …";

(vi) that the appellant ought to have put in evidence of other contemporaneous communication with the first respondent "to qualify these SMSes";

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(vii) that the DC had found no evidence of a draft notice of application for the injunction or draft supporting affidavit; and that there was no prayer for injunction in the statement of claim.

[12] Following *Batu Malay Thandy v. Sures Subramaniam & Ors* [2015] 1 D LNS 343; [2015] 6 MLJ 286, and *Gana Muthusamy v. Tetuan LM Ong & Co* [1998] 4 CLJ 878; [1998] 3 MLJ 341, that in "the discipline of the legal profession, it is best for the affected advocate and solicitor to be judged by his own peers through the statutory mechanisms mandated by the Act"; and that it is "only in rare and exceptional cases" that the court will intervene. E Since he was "not able to fault the decision arrived at by the disciplinary board", the learned Judicial Commissioner dismissed the appeal.

Decision Of This Court

[13] We are mindful that it is a well-settled principle that as a general rule, F there is a policy of non-intervention in matters concerning professional discipline. Parliament has entrusted such matters to the disciplinary board to regulate and discipline members of the legal profession. In *Majlis Peguam v. Dato Seri Dr Muhammad Shafee Abdullah* [2016] 8 CLJ 749 citing *inter alia Re A Solicitor (No. 2)* [1923] 93 LJ KB 761, *Keith Stellar v. Lee Kwang & Tennakoon v. Lee Kwang* [1980] 1 LNS 36; *Gana Muthusamy v. Tetuan LM* G *Ong & Co* [1998] 4 CLJ 878, the Federal Court once again reaffirmed that principle stating that:

> All that is required is that the disciplinary body acts fairly in carrying out its duties, and the hearing is conducted thoroughly with due deliberation and understanding given to the facts of the complaint. Unless the H disciplinary committee in exercise of its powers can be shown to have erred in principle, or to have overlooked, misconceived, or disregarded some material matter of fact, or to have failed to act judicially, the Court ought not to interfere, except in the rarest of cases.

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[14] Having carefully perused the relevant and material facts, the records of appeal and having considered the submissions, we were convinced that this was a rare and exceptional case which warranted our intervention.

[15] First, the complaints. There were two. The second complaint pertaining to the appellant's failure to comply with the 'unless order' and the subsequent striking out of the first respondent's civil action was withdrawn by the first respondent during the inquiry. In the notes of hearing before the DC, it is recorded that the first respondent "Tarik balik kerana saya sekarang faham ini bukan kesalahan responden".

[16] In its report, the DC noted the withdrawal of this second complaint, described here as the "first complaint":

> [3] The Complainant withdrew the 1st complaint against the Respondent after giving evidence that the Johor Bahru case No. 22NCVC-38-01/2016 which was struck out by the Deputy Registrar was reinstated by the Court of Appeal recently and the case is now before the Johor Bahru High Court.

[17] Despite this, the DC referred to and relied on the reinstatement of the case as one of the reasons why it was of the view that the first respondent had not suffered any prejudice: "that the Court of Appeal has reinstated the struck out case to the High Court and the complainant could pursue his application for the said injunction if he wishes to". We are of the view that once the complaint related to the "unless order" had been withdrawn, there should have been no reference whatsoever to that complaint, even one which, at first sight, appears to be in the appellant's favour, which it is in fact, not.

[18] We are of the view that there should have been no reference to or reliance on that episode. As it is, it was taken into account as one of the reasons for the DC's ultimate finding of liability against the appellant. It would also be fair to say that the DC took that into account in making its recommendations of a fine of RM5,000.

[19] In our view, it was erroneous of the DC and for the same reason, the DB, to have taken the event relating to the "unless order" and its outcome into consideration when the complaint on the event had already been withdrawn. Once withdrawn, the DC no longer has any jurisdiction to deal with the matter. The power and thereby the jurisdiction of the DC is derived from the Legal Profession Act 1976, in particular ss. 94 and 99. It is upon a complaint lodged that the DB and thence a DC will act. The DC will investigate, report its findings and make its recommendations to the DB. The moment a complaint is withdrawn, unless there are cogent and real reasons for the DB to suspect otherwise the reasons for the withdrawal, the DB must

A disband all inquiry relating to the withdrawn complaint. There is no residual power or anything akin to inherent power or retained jurisdiction on the part of the DB and certainly even less, in respect of the DC, to investigate, unless the DB itself lodges a fresh complaint on the same.

B **[20]** In the present appeal, the first respondent had withdrawn the complaint on the "unless order" because he now understands that the appellant is not at fault or is not to be blamed for the striking out of his civil action. Under such circumstances, it was wrong for the DC to have relied on this event to make its findings and recommendations to the DB.

C **[21]** Further, we did not find the DC or the DB, satisfying for itself that the complaint was proved against the appellant on the requisite burden of proof. Disciplinary proceedings are *quasi*-criminal in nature and the standard of proving misconduct must be on a standard of beyond reasonable doubt – see *Majlis Peguam v. Cecil Wilbert Mohanaraj Abraham* [2018] 9 CLJ 622; *Lembaga Tatatertib Peguam-Peguam v. Hoo Lin Coln & Anor* [2008] 4 CLJ 317; D [2008] 4 MLJ 1; *Dinesh Kanavaji Kanawagi & Anor v. Ragumaren N Gopal; Majlis Peguam (Intervener)* [2018] 2 CLJ 1; [2018] 2 MLJ 265; *Campbell v. Hamlet* [2005] 3 All ER 1116.

[22] It must also not be forgotten that the DB has substantial powers of E discipline and as part of the penalties it may impose, it may impose fines, suspend the advocate and solicitor concerned, or remove the name of such advocate and solicitor from the Roll, penalties which are far-reaching in their effect. While the courts do not interfere easily, it is not blind to the circumstances and is not averse to intervene where there has been a miscarriage of justice for one reason or other. Thus far, we can already see F serious breaches which were not addressed and put right by the High Court and which now warrants our intervention.

[23] Dealing further with the complaint of the first respondent in respect of the injunction which is in respect of two injunctions that the appellant was supposed to file for; the first in relation to the abuse of RMSB's funds and G mismanagement of RMSB; the second to restrain the convening of an EGM for the removal of the first respondent and his daughter as directors of RMSB, we find even greater cause for concern. The first respondent had paid a total of RM60,000. From the letter of complaint, it would appear that it is only in relation to the third payment that the first respondent makes his complaint.

H **[24]** At paras. 5 and 6 of his letter of complaint, the first respondent claimed that even though the appellant had received RM20,000, he did not file an application for an injunction and it was because of that failure, that the first respondent and his daughter were removed as directors of RMSB.

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[25] At the inquiry, the first respondent explained that on 13 December 2013 he had appointed the appellant to represent him in a case against Lee Say Peng in respect of Lee's abuse of RMSB's funds. The first respondent told the DC that he had instructed the appellant to apply for an injunction in respect of the funds but nothing was forthcoming for more than half a year. When Lee Say Peng issued a letter stating that an EGM will be convened, he paid the appellant more money and instructed him to apply for an injunction restraining the convening of an EGM.

[26] Until July 2014, the appellant did not apply for any injunction whether in respect of the abuse of funds or the convening of the EGM. This is despite the first respondent paying him. The first respondent and his daughter were removed as directors following RMSB's EGM on 20 February 2014.

[27] This was the written explanation of the appellant given pursuant to the second respondent's request made under s. 100(1)(b) of the Act. The explanation covered the following areas:

(i) Background

(ii) Objection against M/s Patrick Dass & Co as solicitor for complainant in this disciplinary proceedings

(iii) The claim

(iv) RKC advice

(v) Instructions on EGM

(vi) Instructions to file injunctions

(vii) Fee structure

(viii) The striking out of the statement of claim is no fault of RK & Co

[28] As "background", the appellant explained that he was approached by the first respondent, that they met "few times in December 2013 prior to the official appointment"; that the first respondent came with his wife, daughter, son-in-law and advisor/consultant/audit consultant by the name of Tee Beng Yap (Tee); and that he was "officially appointed on 13 December 2013".

[29] In relation to the first respondent's claim, the appellant identified what he understood was his claim, that the first respondent claimed that the majority shareholder (LSP) had misappropriated RMSB's funds. RMSB being in the business of handling funeral services, managing memorial park and its related services. The appellant understood from the first respondent that there were "payments/contribution received by RMSB were not credited into company's accounts, some cash collection were not recorded and sham transactions and payments were made to unknown and unrelated third parties."

[30] After "various discussions," the first respondent "agreed" with the appellant's advice and "instructed RK to file summons and statement of claim against LSP". The suit, JBHC 22NCVC-38-02-2014, was filed "based on derivative action and for the benefit of RMSB." Aside from LSP, three others were also sued including the company secretary, Ng Bee Siang (NBS). She was brought in as the "fourth defendant due to the instructions that she has conspired with first and second defendant to deny LKC access to the company's document and account. NBS had arranged for EGM to oust LKC as director of RMSB."

[31] More specifically, the appellant explained what his advice was which was agreed to by the first respondent:

RKC advice

(a) RK has given detailed advice to LKC, family and Tee according to area as specified in the brief outline given to LKC.

(b) LKC has fully aware that derivate action and protection to minority shareholder are available to him. Injunctive relief is open to him subject to him satisfying court on various principles such as merit of his claim and balance of convenience.

(c) RK was also appointed to appear as watching brief counsel for criminal complaint lodged against LSP (Kluang Report No. 15705/13 – Kluang Session Court No. 62-10-02-2014, 62-11-02-2014, 62-12-02-2014, 62-13-02-2014-10 charges).

[32] The appellant produced his record of the instructions taken after his meetings with the first respondent:

Memorial Reliable Services Berhad

Low's Matter

1. Minority shareholder position
2. Company *status quo* – running company as usual
3. Injunction
   (a) Company's money not being taken,
   (b) No unnecessary instruction given by L.S. Peng
4. Monitor police case
5. Order for account and transaction to be audited

Protection

1. 2 million ++ - Losses estimation
2. Company's business valuation – 20 million ++
3. Low's share 40% value _____

Legal fee

1. Lawyer fee
   - 1st stage – RM 100K
   - 2nd stage - >< RM 100K
   - 3rd stage – appeal to higher court (COA and FC) – to be discussed.
2. Disbursement (RM30,000.00)
   - Court fee
   - Agent service
   - Security service

[33] On the first respondent's complaints about his instructions on the EGM and the injunctions, this was the appellant's written explanation:

5. Instructions on EGM

a. I deny complainant's allegation.

b. Legal advice as regard to the right of LKC and his position as shareholder and director of RMSB was given at length and few options were proposed.

c. LKC has appointed proxy to attend EGM of RMSB on 20/02/2014 to vote against the resolution to ousted LKC as director. A lawyer namely Amrik Singh was appointed proxy of LKC and has attended the EGM.

d. LKC was well aware of his minority position and the legal demand issued by RKC to hold or cancelled the EGM. During this period documentations and proof were still lacking to satisfy RKC to initiate interim remedy.

6. Instructions to File Injunctions

a. LKC, family members and Tee were advice the detailed of this aspect including prospect of obtaining the above relief. They are fully aware of the shortcoming of documentary proof because LSP has taken control in full the daily operation of the RMSB. The other directors and company secretary also seem to be siding LSP.

b. Tee who was appointed by LKC as his audit consultant agreed that the injunction relief was for beyond successful due to:

   (i) Lack of proof;

   (ii) Account records were under LSP control;

A

(iii) Previous audited account and report were signed and approved by LKC;

(iv) LKC failed to show proof how much capital he has invested into RMSB.

c. LKC and Tee have agreed and instructed RK to file the Summon and Injunction relief will be filed soon after LKC and Tee can provide more supporting proof to that effect.

B

d. LKC was made aware on the principle of Injunction relief and it is not as of right. It is upon court discretion after considering merit of claim, balance of convenience and the damages or losses caused cannot be compensated.

C

e. After the claim was filed and Defendants filed their Defence and Counter Claim parties have shown keen interest to try mediation process handled by Judge Teo Say Eng and parties have attended three (3) series of mediation.

D

f. At this juncture, the Injunction relief intend to seek by LKC was kept abeyance due to the discussion/negotiation in the mediation process and LKC has full knowledge of this instruction.

g. LKC also failed to obtain official RMSB statement of account from bank because he was not the signatory.

E

h. There was also criminal complaint lodged by LKC and LSP was arrested and investigated. The investigation officer also has made investigation as regard to the misappropriation.

i. RK has obtained criminal court order that copy of documents related to the interest of complainant to be supplied to RK as watching brief lawyer. These documents mostly related to sham transactions as alleged by complainant. These documents are pending to be supplied by the prosecution.

F

[34] The appellant also explained on the fee structure:

7. Fee Structure

G

a. Legal fee was based on the solicitor's client agreement.

b. LKC was allowed to pay RKC in terms of instalment.

c. The complainant's averment that the payment made for specific purpose or task in the appointment was devoid of merit and totally denied by RKC.

H

d. The payment to RKC should be according to the stages as stated in the brief outline provided by RK to LKC.

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[35] This is how the DC understood the appellant's explanation:

(B) The Respondent's Case and Evidence

[8] The Respondent was appointed by the Complainant on 13.12.2013 with instructions to file an Injunction against Lee Say Peng (a director of Reliable Memorial Services Berhad) from further misappropriating monies belonging to Reliable Memorial Services Berhad.

[9] The Respondent confirmed that this instruction was from the beginning of the appointment. The Respondent had discussed with the Complainant as to the application for the said Injunction about 18 times since his appointment.

[10] The Complainant had always come to his office with CW2 or with his Auditor, Tee Beng Yap.

[11] After several discussions with the Complainant, the Respondent could not find any merit for an Injunction as he had asked for further documents in relation to the misappropriation by the said Lee Say Peng but the Complainant could not provide to the Respondent.

[12] Further, the Complainant had also signed the audited accounts for the year 2011, 2012 and 2013 whereby the Complainant had certified that the accounts are all correct.

[13] The Respondent in summary stated as follows in relation to the documents:

(i) By way of a letter dated 20/4/2014, the Respondent has written to the DPP's Office requesting for the copy of the 10 criminal charges against the said Lee Say Peng.

(ii) The Respondent also attended the Kluang Sessions Court on 14/4/2014 and had asked for the said documents whereby the Sessions Court Judge had allowed the Respondent's application but the Respondent did not get the said documents.

(iii) The Respondent had written to the Public Bank requesting for the Statement of Account on 28/01/2014.

(iv) The Respondent had also written to the Defendant 1, 2, and 3's Solicitors, Messrs DJ Louis seeking confirmation in relation to the suspicious transactions of Lee Say Peng.

(v) No supporting documents were received from the Complainant's accountant, Teng Beng Yap and in fact the said Tan Beng Yap was sued by the Complainant for not providing the audited reports of Reliable Memorial Services Berhad to the Complainant.

(vi) The Complainant had told the Respondent that he had owed Lee Say Peng RM 10 million in relation to a Sale and Purchase of Shares agreement between them.

(vii) The Respondent could not proceed with the Injunction as the Complainant's case did not meet the standard enunciated in the case of American Cynamide and that the Complainant was not willing to give an undertaking as to damages to the Court.

(viii) The matter was subsequently mediated on 23/6/2014, 07/07/2014 and 20/07/2014 before the Learned High Court Judge and the matter was nearly settled and that in that mediations, the Injunction Relief sought by the Respondent was also discussed

(ix) The Respondent later admitted that he had replied to the SMS's by CW1 and CW2 in relation to the filing of the Injunction but no documents were forthcoming from the Complainant.

[36] In the report, the DC had also noted the appellant's mitigation, which to a large extent, repeats the explanation given:

(a) I have done the best to any ability in this case to honour the appointment by the Complainant. I also must do my duty to Court to file an action with all the relevant documents for the Court to adjudicate.

(b) The Complainant and/or agent did not furnish me with the proper documents except for the details of the cheques. The Complainant did not want to give any undertaking to the Court as to damages.

(c) The injunction was also discussed in the mediation before the Judge and the case was nearly settled.

(d) The Complainant had not suffered any prejudice as his now solicitors are pursuing the injunction.

[37] We have already set out the findings and recommendations of the DC which findings and recommendations were subsequently relied on by the DB to find the appellant liable and to fine him the sum of RM5,000.

[38] From the report of the DC, it is evident that the DC understood the first respondent's complaint is the appellant's failure "to file the summons and injunctive relief to prevent the monies being abused … and also to prevent him from giving any order that would be detrimental to the company … paid the respondent a total of RM60,000 to file the injunctive relief in order to prevent the extraordinary general meeting from being held which the purpose of the EGM was to remove the complainant and complainant's daughter from being the directors of the company which the respondent failed to do so." In short, the appellant failed to carry out the first respondent's instruction, and the instructions were all about filing for injunctive relief.

[39] According to the DC, because there was no prayer for such relief in the statement of claim filed, no evidence of any draft notice of application for the injunction or a draft supporting affidavit prepared, and more particularly, because there was no evidence that the appellant "could not file the application for injunction as the unavailability of the documents from the complainant"; the DC "don't find any reason why the respondent had been promising the complainant that he would be filing the cause papers for an injunction whereby he did not to (*sic*) do so at all." Consequently, the DC found the appellant liable for misconduct under s. 94(3)(n) of the LPA 1976, that he had gross disregard of the first respondent's interests when he did not file the application for injunction.

[40] With all due respect, the approach adopted by the DC reflects the failure of the DC and by reason of its adoption without more, the DB, to properly evaluate the complaint and appreciate it in the full context of the first respondent's instructions to the appellant; and how the non-filing for the injunctive relief despite promising to do so is gross disregard of the first respondent's interests amounting to "misconduct" within the terms of s. 94(3)(n) of the LPA 1976. Section 94(3) provides:

> (3) For the purposes of this Part "misconduct" means conduct or omission to act in Malaysia or elsewhere by an advocate and solicitor in a professional capacity or otherwise which amounts to grave impropriety and includes:
>
> (a) conviction of a criminal offence which makes him unfit to be a member of his profession;
>
> (b) breach of duty to a court including any failure by him to comply with an undertaking given to a court;
>
> (c) dishonest or fraudulent conduct in the discharge of his duties;
>
> (d) breach of any rule of practice and etiquette of the profession made by the Bar Council under this Act or otherwise;
>
> (e) being adjudicated a bankrupt and being found guilty of any of the acts or omissions mentioned in paragraph 33(6)(a), (b), (c), (e), (f), (h), (k) or (l) of the Bankruptcy Act 1967;
>
> (f) the tendering or giving of any gratification to any person for having procured the employment in any legal business of himself or any other advocate and solicitor;
>
> (g) directly or indirectly procuring or attempting to procure the employment of himself or any other advocate and solicitor through or by the instruction of any person to whom any remuneration for obtaining such employment has been given by him or agreed or promised to be so given;

A (h) accepting employment in any legal business through a tout;

(i) allowing any unauthorised person to carry on legal business in his name without his direct and immediate control as principal or without proper supervision;

B (j) the carrying on by himself, directly or indirectly, of any profession, trade, business or calling which is incompatible with the legal profession or being employed for reward or otherwise in any such profession, trade, business or calling;

(k) the breach of this Act or of any rules made thereunder or any direction or ruling of the Bar Council;

C (l) the disbarment, striking off, suspension or censure in his capacity as a legal practitioner in any other country or being guilty of conduct which would render him to be punished in any other country;

(m) the charging, in the absence of a written agreement, in respect of professional services rendered to a client, of fees or costs which are D grossly excessive in all the circumstances;

(n) gross disregard of his client's interests; and

(o) being guilty of any conduct which is unbefitting of an advocate and solicitor or which brings or is calculated to bring the legal profession into disrepute.

E

[41] The evaluation by the DC, certainly, does not reflect any appreciation of the legal principles and considerations at play, which we say is necessarily required of the DC. While the first respondent may have wanted and had instructed for injunctive reliefs, it was always incumbent on the appellant, F befitting his professional role and duties as advocate and solicitor, to ensure that the first respondent's complaints meet the applicable and relevant legal threshold before filing any such application.

[42] The appellant had given his reasons as to why he did not file any application for an injunction, and there were plenty. None of the reasons G seem to have been considered by the DC.

[43] The appellant explained that he had given detailed advice to the first respondent, meeting him together with his family members, about 18 times since his appointment (attendance records were produced in support). According to the appellant, after several discussions with the first H respondent, he could not find any merit for an injunction, that the first respondent was aware of the principles of injunctive relief involved, that the remedy was not available as of right but a matter of discretion. There was lack of proof and documentation on misappropriation by LSP. Although requested, the first respondent could not provide the documentation

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necessary to prove misappropriation by LSP. Amongst the documents sought were those related to the ten criminal charges against LSP which the appellant himself had sought from the DPP and from the Kluang Sessions Court; but was himself unsuccessful.

[44] The appellant also explained that the first respondent was fully aware of the shortcomings of the documentary proof and that Tee, the accountant, had agreed with the appellant that the "injunctive relief was far beyond successful due to lack of proof, account records under LSP who had taken over full control of RMSB, previous audited accounts and reports had been signed off and approved by the first respondent himself, and that first respondent was not able to provide proof of his investment in RMSB. The first respondent was also not able to obtain the official RMSB statement of account from the bank as he was not a signatory. The appellant added that both Tee and the first respondent had agreed and instructed the appellant to file for injunctive relief once more supporting proof was obtained.

[45] The appellant produced correspondence and evidence in support of his explanation. As per the statement of claim filed, the appellant had written to *inter alia*, the company secretary (who was later sued as the fourth defendant), requiring the company secretary to be impartial, advise the cancellation of the EGM, keep proper secretarial record and to allow the first respondent access to RMSB's documentation, that the calling of the EGM to remove the first respondent was made in bad faith. The appellant had also been in touch with the solicitors for the defendants sued on the matter of maintaining *status quo* and due diligence apart from raising details of doubt transactions – see pp. 460 to 468 of record of appeal jilid 2C.

[46] On the matter of the EGM, the appellant had explained that he had given advice at length on the matter to the first respondent, that he had proposed a "few options" to the first respondent; that a lawyer had attended the EGM as proxy of the first respondent and to vote against the resolution to oust the first respondent. Evidence of the proxy was produced – see p. 503 jilid 2C.

[47] The appellant also explained that after the derivative claim had been filed and the defence and counterclaim had been filed, the parties had shown a "keen interest" to try mediation. Three sessions were conducted by a judge. At those sessions, the matter of injunctive relief was also discussed. Unfortunately, the mediation failed. The appellant explained that the application for injunctive relief was thus held in abeyance, and the first respondent again, was aware. Again, this was not disputed by the first respondent. The appellant had also added that he was mindful of the business that RMSB was engaged in, that it managed funeral and related services and

that he was of the view that the operation of the funeral services should not be disrupted due to the dispute between the shareholders of RMSB. There is evidence to this effect – see letter exchanged between the appellant and the solicitors for LSP and others at p. 461 of jilid 2C.

[48] None of the above was taken into consideration. Neither was the appellant's explanation given on oath during the inquiry that he met the first respondent over 18 occasions and that there were many SMSes exchanged between them. Both the record of the inquiry and the report do not indicate that to be untrue or incorrect.

[49] Instead, the DC faulted the appellant for not writing to the first respondent or to any other parties such as the auditor or the accountant appointed by the first respondent, and that would be Tee, on "the unavailability of the documents needed to file an injunction". This conclusion is wholly inconsistent with the evidence before the DC including the fact that the first respondent had sued Tee for not providing the audited reports of RMSB to the first respondent.

[50] We also note that the DC found a set of signed jurat by the first respondent prepared for the purpose of any interim reliefs to be filed by the first respondent. While we must immediately record our disdain at such acts and such pre-signed documents, we say, that at the very minimum, these documents indicate that together with all the other actions taken thus far by the appellant (including holding a watching brief at the criminal action against LSP and liaising with the police), there were indeed, much effort undertaken by the appellant towards filing for interim relief.

[51] However, due to the lack of documents and most importantly, the first respondent's own refusal to provide an undertaking as to damages, an undertaking which is absolutely paramount in any application for interim injunctive relief and which is required by law, the failure to file injunctive relief was fully and adequately accounted for by the appellant. The appellant was in no position at all to file, and it would have been wrong for him to do so under such circumstances.

[52] Advocates and solicitors are engaged for their professional advice, skill and knowledge. They are not intended to be like automatic dispensing machines, doing what the client instructs, regardless. Without exception, the duty and responsibility of any advocate and solicitor is always to the court and to the proper administration of justice. The appellant, cannot, in truth and in all good conscience, discharge his professional duty had he proceeded to file the application for injunctive relief with the knowledge and in the face of the advice he had given the first respondent that he would not be able to

meet the legal tests for an injunctive relief. He had said so repeatedly and consistently at the inquiry and this was not disputed by the first respondent. Yet, scant regard was given to this explanation by the DC, and later by the DB.

[53] Reverting to the standard of proof that was required to be satisfied in order to find the appellant liable for misconduct by grossly disregarding the interests of his client, that is, the first respondent's interest, we do not see any consideration or deliberation by the DC or the DB. Neither did we see this addressed by the High Court. This is vital even though the court refrains from intervening in matters of discipline. The appellant was being disciplined for misconduct by reason of him having grossly disregarded his client's interests. It is only misconduct when it is proved on beyond reasonable doubt that the appellant had grossly, and not merely disregarded the first respondent's interests. The use of the term "gross" denotes a level of extreme conduct where such conduct is not acceptable, is clearly wrong or is abjectly offensive or unreasonable by the standards maintained at the Bar or the legal profession of which the appellant is a member.

[54] As alluded to earlier, we do not see any consideration of that nature, as required in law. The LPA 1976 provides for an avenue of appeal to the court and in that capacity, the court must scrutinise the records and reports and satisfy itself that all requirements and tests have been met. We do not see this being conducted by the learned judge. In fact, there was a failure to give due and proper weightage to the appellant's case. The evidence led to prove misconduct under s. 94(3)(n) of the LPA 1976 did not meet the established standard of proof in which case, the DC and thereby the DB, ought to have dismissed the complaint of the first respondent.

[55] For all the reasons explained above, we are compelled to intervene.

[56] The appeal of the appellant is with merit and we unanimously allow this appeal with no order as to costs. The order of the High Court and the order of the DB are hereby set aside and the fine paid is further ordered to be refunded.